IN THE HIGH COURT OF JUDICATURE AT BOMBAY

APPELLATE SIDE

SECOND APPEAL NO. 1185 OF 2004

Karbhari Sakharam Chakane ... Appellant

V/s

Smt. Deubai Damu Barke ... Respondent

Shri R.B. singh for the appellant.

CORAM: P.V. KAKADE, J.

DATED: 19TH OCT., 2004.

P.C.:

1. Heard advocate for the appellant.

2. This is an appeal preferred against the judgment and order passed by the Addl. District Judge, Nasik, dated 21.1.2002 allowing the appeal of the defendant and setting aside the order passing the decree in favour of the plaintiff made by the Civil Judge, Jr. Divn., Sinnar dated 30.6.1998 whereby it was held that the defendant had made encroachment upon the land of the plaintiff.

3. The plaintiff-appellant filed suit against the

defendant alleging that he owned land of Block No. 330 admeasuring 1 hectare 52 R, situated at village Deshwandi, Tal. Sinnar. It is his ancestral property and he is in possession of the same. Adjacent to his land, on eastern side, there is land of defendant bearing Block No.343. The case of the plaintiff was that, as defendant started making encroachment upon his land, he applied for measurement on 12.2.1982 to District Land Record office and accordingly, the measurement of the suit land was fixed on 16.12.1982 in which it was transpired that the defendant has removed the boundary-mark and made encroachment to the extent of 7 R from eastern side of the suit land and, therefore, the suit was filed for removal of the encroachment.

The defendant resisted the suit and challenged the allegations made by the plaintiff submitting that no such encroachment was made. The learned Trial Judge adjudicated the dispute on merits and concluded that the plaintiff had proved the encroachment on his land and, therefore, decree was passed in the suit. It may also be noted that physical evidence was recorded by the Judge against which the first appeal was preferred. However, the first appeal was allowed and the District Judge remanded the matter and the trial was again

conducted and after leading further evidence and recording findings, the decree came to be passed. The appeal was carried to the District Court, Nasik and after hearing both sides, the Addl. District Judge, Nasik, came to the conclusion that the encroachment was not proved by the plaintiff and, as such, the appeal came to be allowed. Hence the present appeal.

4. At the outset, it may be noted that no substantial question is involved in this appeal as the issues involved are purely questions of fact and are seen to be adjudicated by the learned lower appellate Court Judge after appreciating the evidence on record in proper perspective holding that the evidence of the Cadestral survey was not reliable and, as such, the map drawn by him was not good evidence and, therefore, it was discarded. Time and again, the Apex Court has held that, it is not within the domain of the High Court to investigate the ground in which the findings are arrived at by the last Court of fact being the first appellate Court. In a case where from a given set of circumstances two inferences are possible, one drawn by the lower appellate Court is binding on the High Court in second appeal. Adopting any other approach is not permissible. This is especially so when the lower

appellate Court Judge is seen to have assessed the Cadestral surveyor’s evidence in proper manner while holding that the encroachment shown in the map drawn by him was in fact was not possible because the distance between the lands of plaintiff and defendant, Gat No.342 belong to a third person and unless and until defendant encroaches upon the land of Gat No.342, it would not be physically possible for him to encroach upon the plaintiff’s land.

In view of this position, I do not see any merit in the appeal and it stands dismissed in limine with no order as to costs.

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